6-7-1976

Southeast Coal Company v. Harmie Griffie, James R. Yocom, Commissioner of Labor and Custodian of the Special Fund, Special Fund, and Workmen's Compensation Board

Appellee's Brief 1976-SC-0293

APPELLEE'S BRIEF

3799

SUPREME COURT OF KENTUCKY

FILE NO. 76-293

SOUTHEAST COAL COMPANY ..... APPELLANT

VS:

HARMIE GRIFFIE, JAMES R. YOCOM, Commissioner of Labor and Custodian of the Special Fund, SPECIAL FUND, and WORKMEN'S COMPENSATION BOARD ... APPELLEES

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE F. BYRD HOGG, JUDGE

BRIEF FOR APPELLEE JAMES R. YOCOM

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Pursuant to RCA 1.250, true copies of the within Brief for Appellee James R. Yocom have been mailed to Hon. Gayle G. Huff, Rice & Huff, Attorneys at Law, Harlan, Kentucky 40831; Hon. Lester H. Burns, Jr., Attorney at Law, Burnside, Kentucky 42519, Hon. William L. Huffman, Jr., Workmen's Compensation Board, Frankfort, Kentucky 40601, and Hon. F. Byrd Hogg, Judge of Letcher Circuit Court, Whitesburg, Kentucky 41858, this the 7th day of June, 1976.

John L. Pendley
Counsel for Appellee James R. Yocom

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PRELIMINARY STATEMENT

The interests of the appellant and this appellee are not adverse on the second issue presented by appellant. Therefore this appellee will confine its discussion in this brief to the first issue presented by the appellant.

QUESTION PRESENTED

WHETHER LETCHER CIRCUIT COURT ERRED IN AFFIRMING THE WORKMEN'S COMPENSATION BOARD'S DECISION THAT THE EVIDENCE OF RECORD DOES NOT SUPPORT ANY ASSESSMENT OF LIABILITY AGAINST THE SPECIAL FUND PURSUANT TO K.R.S. 342.120(1)(b).

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MAY IT PLEASE THE COURT:

Unless otherwise apparent or indicated, throughout this brief numbers in parentheses refer to pages in the original record of the Workmen's Compensation Board. The Appellee, Harmie Griffie, is usually referred to as Appellee or compensation claimant.

STATEMENT OF THE CASE

This appellee adopts appellant's Statement as contained in its brief.

ARGUMENT

THE JUDGMENT OF LETCHER CIRCUIT COURT, WHICH AFFIRMED THE BOARD'S FINDING THAT THE EVIDENCE OF RECORD DOES NOT SUPPORT ANY ASSESSMENT OF LIABILITY AGAINST THE SPECIAL FUND, WAS CORRECT AND MUST BE AFFIRMED BY THIS COURT.

The Appellant argues on this issue that "there is no substantial basis on which the Board could properly dismiss the Special Fund from any liability." Appellant's Brief, p. 11) This appellee urges that appellant's question presented and argument thereon are stated exactly backwards. The issue before all tribunals which have heard this case in its various forms is not whether the Special Fund could be properly dismissed from liability by the Board in this case, it is rather whether there is any substantial basis upon which liability can be imposed against the Special Fund. The Board correctly determined that there was not, which determination was upheld on appeal to Letcher Circuit Court. This Court must affirm the judgment of Letcher Circuit Court on this issue.

In reviewing the Board determination in issue here, the task of reviewing courts is, as stated in *Logan Company* v. *Amic,* Ky., 479 S.W.2d 1, to determine

> . . . whether the medical testimony . . . where considered as a whole, is so clear and positive that any reasonable, objective fact finder should be compelled to accept it. *Supra,* p. 3.

In this case, the issue is not whether the evidence supporting dismissal of the Special Fund is so clear and positive

that it compels the fact finder to dismiss the Special Fund. It is whether the evidence which, it is urged, supports an award against the Special Fund is so strong as to compel a reviewing court to conclude that the Board's dismissal of the Fund was clearly erroneous.

In this connection, both Dr. Hunter and Dr. Gillespie testified that the plaintiff's disability was due in part to the arousal into disabling reality of a pre-existing disease or condition. (44, 45, 74). Dr. Miller testified that he was unable to determine whether there was any such arousal here. (98, 99). This evidence seems on its face to support a finding that liability should be imposed on the Special Fund pursuant to KRS 342.120(1)(b). However, as Appellant itself points out, and as stated in *Logan Company* v. *Amic, supra* at 2, 3, construing *Inland Steel Company* v. *Johnson,* Ky., 439 S.W.2d 562, "substance [of medical testimony] should prevail over form and a physician's testimony should be examined in its total meaning rather than word for word." In the testimonies of Drs. Gillespie and Hunter, the *form* alone, and not the substance, seems to support an apportionment of liability against the Special Fund. The form of the cited testimony is to the effect that there was an arousal of a pre-existing disease or condition into disabling reality. Yet the testimony gets its form from the words used by counsel for appellant, not from the physicians' own words. It was counsel for appellant who used the words "pre-existing disease or condition", not the physicians.

That there is no substance behind this form is amply demonstrated by the fact that no physician identified with

particularity a specific disease or condition which was aroused into disabling reality by claimant's accident.

Some of the more common diseases and conditions encountered in back injury cases are osteoarthritis of the vertebral bodies, spondylolisthesis, and degenerative disc disease. Degenerative disc disease cannot be diagnosed conclusively without the proper findings on myelogram testing. A myelogram was performed on this claimant at the request of his treating physician, and was interpreted as showing no abnormality. (72) That Dr. Gillespie decided there had been no ruptured disc indicates further the absence of degenerative disc disease. (73). The other disease entities mentioned above are commonly diagnosed from x-ray. Dr. Hunter's report of his x-ray findings fails to mention either osteoarthritis or spondylolisthesis. (39, 40). Dr. Miller also performed x-ray studies, which he testified were normal. (89). There are many other disease processes which could have been enumerated by the physicians as diseases which were aroused into disabling reality by the accident which claimant sustained. Suffice it to say that no doctor named any of them in this case as having played a part in the claimant's disability.

It is therefore clear that the evidence of record which in form seems to compel a finding that claimant's disability was contributed to by the arousal into disabling reality of a pre-existing disease or condition is in actuality without substance in that the physicians did not specifically identify any particular condition that was aroused into disabling reality here, and because the testimony concerning arousal was actually from the words used by

counsel in asking the question rather than in the words used by the witnesses in answering. Therefore the record is devoid of any substantial evidence that supports a finding of liability against the Special Fund.

CONCLUSION

The Workmen's Compensation Board having determined that the Special Fund should be dismissed from this proceeding, the Letcher Circuit Court properly considered whether there was substantial evidence of record on which to base a finding that the Special Fund should be held liable for a portion of this claimant's ~~liability~~ disability and determined that there was not. This finding by the Letcher Circuit Court was correct and should be affirmed by this Court.

Respectfully submitted,

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